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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

SALVADOR A. GODINEZ,

Petitioner,

v.

JEROME WHITE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONER

JAMES E. RYAN
Attorney General of Illinois

WILLIAM L. BROWERS*
Assistant Attorney General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-2569

*Counsel of Record

Counsel for Petitioner

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

ARGUMENT 1

CONCLUSION 10

TABLE OF AUTHORITIES

Cases PAGE(S)

Boerckel v. O'Sullivan, 135 F.3d 1194 (7th Cir. 1998) 4, 6, 7

Brown v. Allen, 344 U.S. 443 (1953) 9, 10

Caldwell v. Mississippi, 472 U.S. 320 (1985) 9

Castille v. Peoples, 489 U.S. 346 (1989) 6

Cawley v. DeTella, 71 F.3d 691 (7th Cir. 1995) 4

Costarelli v. Massachusetts, 421 U.S. 193 (1975) (*per curiam*) 8

Galvan v. Gilmore, 997 F.Supp. 1019 (N.D. Ill. 1998) 4, 5

Gomez v. Acevedo, 106 F.3d 192 (7th Cir. 1997), vacated on other grounds, ___ U.S. ___, 118 S.Ct. 37 (1997) 4

Harris v. Reed, 489 U.S. 255 (1989) 8, 9

Hogan v. McBride, 74 F.3d 144 (7th Cir. 1996) 4, 6, 8

Jennison v. Goldsmith, 940 F.2d 1308 (9th Cir. 1991) (*per curiam*) 1

Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992) 3

Michigan v. Long, 463 U.S. 1032 (1983) 9

Nutall v. Greer, 764 F.2d 462 (7th Cir. 1985) 4, 8

O'Sullivan v. Boerckel, ___ U.S. ___, 1998 U.S. LEXIS 7478 (1998) 1

Pennsylvania v. Finley, 481 U.S. 551 (1987) 6

People v. Neal, 142 Ill.2d 140 (1990), *cert. denied, Neal v. Illinois*, 502 U.S. 943 (1991) 10

People v. Partee, 268 Ill.App.3d 857, 645 N.E.2d 414 (1st Dist. 1994) 6

Rose v. Lundy, 455 U.S. 507 (1982) 3

White v. Godinez, 143 F.3d 1049 (7th Cir. 1998) . . . 4, 5

Wilwording v. Swenson, 404 U.S. 249 (1971) 10

Statutes and Rules

28 U.S.C. § 2254(c) 1, 8

28 U.S.C. § 1257(a) 8

705 ILCS 10/12 3

725 ILCS 5/122-4 6

Illinois Supreme Court Rule 315(b) 3

Illinois Supreme Court Rule 651(c) 6

Illinois Supreme Court Rule 315(a) 7

Other

See Note, *Requiring Unwanted Habeas Corpus Petitions to State Supreme Court for Exhaustion Purposes: Too Exhausting*, 79 MINN. L. REV. 1197, 1225 (1995) (authored by Matthew L. Anderson) 3

Brief For Respondents, *Harris v. Reed*, No. 87-5677, October Term, 1987 9

ARGUMENT

Confronted by this Court's grant of *certiorari* in *O'Sullivan v. Boerckel*, ___ U.S. ___, 1998 U.S. LEXIS 7478 (1998),[1] White strives to distance this case from that one, arguing that post-conviction review is somehow so different than direct appeal that there is no need for uniformity in the federal courts when the federal *habeas* claim has been raised on post-conviction rather than on direct appeal. White's effort is entirely empty, is internally inconsistent, and is not in conformity with Illinois law with respect to the availability of counsel on post-conviction collateral attacks and appeals therefrom. The situation here presents no less compelling reasons for a grant of *certiorari* than were presented in *Boerckel*.

White asserts that the grant of *certiorari* in *Boerckel* was "justified" because the states are "virtually uniform in their treatment of direct appeals," (Brief in Opposition, page 3), then argues that, due to the variability of the states' treatment of post-conviction review, which he catalogues extensively, there "is no basis for providing a uniform exhaustion rule" in this context. (Brief in Opposition, page 3). Petitioner seriously doubts that the states are "virtually uniform in their treatment of direct appeals," and White offers no authority to support his assertion in this respect.

More importantly, Petitioner maintains that it is erroneous to focus exclusively on state law to determine whether exhaustion has occurred, when the exhaustion doctrine, rooted as it is in a federal statute, 28 U.S.C. § 2254(c), is, of necessity, a federal question. *See Jennison v. Goldsmith*, 940 F.2d 1308, 1310-1311 (9th Cir. 1991) (*per curiam*). The federal question of whether a *habeas* petitioner has exhausted state remedies necessarily will be answered differently depending on what remedies the various states make

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[1] White errs in indicating that *certiorari* was granted on November 13, 1998. In fact, the order was entered on November 16, 1998.

available. This fact will be as true on appeals from collateral attacks of state court convictions as it will be on direct appeals of such convictions. Petitioner's point is that, whatever such remedies might be, if the states' highest courts are available to address the claims to be raised on *habeas* review, those courts should not be frozen out of the process by a federal rule which allows *habeas* petitioners to bypass such courts.

Apparently inconsistently with his focus on state law, White appears to concede that the question of exhaustion is a federal one, since he asserts that "[t]he individual federal courts of appeal—localized as they are—remain best equipped to analyze individual states' collateral review procedures and practices, and therefore, to decide whether the failure to include a collateral review claim in a discretionary review petition to a state's highest court should bar the litigation of that claim in a federal habeas petition." (Brief in Opposition, at 3). If White is willing to concede that the question of exhaustion is a federal one, then he can posit no reason why the question is not worthy of review by this Court.

White laments that the uniform rule sought by Petitioner "will do little more than require countless prisoners in many states to make filings futile under the prevailing practices in their states, while adding significant time delays to the path leading to the final adjudications of their convictions." (Brief in Opposition, at 3). This statement is fraught with misconceptions.

First, even if a state's highest court is one of only discretionary review, it is simply inaccurate to describe as "futile" the filing of a petition for review by such a court. Obviously, White did not deem leave to appeal to the Illinois Supreme Court as an undesirable act in futility. He sought review in that court, albeit without raising the issues which the federal district court found procedurally defaulted.

Further, even assuming that only some small percentage of cases is accepted on discretionary review, the fact re-

mains that cases are accepted on discretionary review by the states' highest courts, and that some federal *habeas corpus* cases or issues undoubtedly will be obviated by the acceptance of some of those cases. *See* Note, *Requiring Unwanted Habeas Corpus Petitions to State Supreme Court for Exhaustion Purposes: Too Exhausting*, 79 MINN. L. REV. 1197, 1225 (1995) (authored by Matthew L. Anderson).

Requiring future federal *habeas* petitioners to seek review in the states' highest courts is desirable and in accordance with notions of federalism and comity. It will insure that those courts play a role in addressing petitioners' constitutional claims, before the claims even need be brought to the federal courts. It also will allow those courts to guide the lower courts within their states in the development of expertise in this area. *See Keeney v. Tamayo-Reyes*, 504 U.S. 1, 9 (1992); *Rose v. Lundy*, 455 U.S. 507, 518 (1982). A rule allowing the bypass of state supreme courts on the way to federal *habeas* courts denigrates the importance of state supreme courts.

White's claim of "significant time delays" rings rather empty, at least under Illinois law. In Illinois, a litigant has between 21 and 35 days after the Appellate Court's decision in which to file a petition for leave to appeal to the Illinois Supreme Court. *See*, Illinois Supreme Court Rule 315(b). Since the Illinois Supreme Court convenes five terms a year (705 ILCS 10/12), petitions for leave to appeal do not remain pending for an inordinate amount of time. Thus, if a petition is deemed unworthy of a grant of review, the petitioner will be in a position to seek federal *habeas* relief relatively quickly. On the other hand, if a petition is allowed, there remains a distinct possibility that the criminal appellant will gain relief in the state courts from his conviction.

Moreover, while Petitioner can appreciate White's voiced concern for delay, White is entirely disingenuous in framing his concern in terms of "delays to the path leading to the

final adjudications of their convictions." (Brief in Opposition, at 3). It is the government which seeks finality in state, or federal, criminal convictions. Criminal defendants hardly seek the finality of litigation, and the existence of the instant litigation some 15 years after Jerome White's state court conviction is a testament to that fact. That is not to say that convicted criminals have no valid concern for delay. They do. But their concern is with delay in the vindication of what they perceive to have been constitutional errors which led to their convictions, and not in the finality of their convictions.

At page 6 of his Brief in Opposition, citing *Galvan v. Gilmore*, 997 F.Supp. 1019, 1029 (N.D. Ill. 1998), White indicates that, in Illinois, the likelihood of obtaining discretionary review after collateral post-conviction review "is even more remote than on direct appeal[,]" and asserts that, in such a state, leave to appeal should not be required in order to exhaust state remedies. White's argument is based on a mischaracterization of the language in *Galvan*, and is not well taken, in any event.

Before its decision in the case at bar, (*White v. Godinez*, 143 F.3d 1049 (7th Cir. 1998)), the Seventh Circuit had explicitly held, in the post-conviction context, that a *habeas* petitioner would suffer the procedural default of claims not raised on leave to appeal to the Illinois Supreme Court. *Cawley v. DeTella*, 71 F.3d 691, 695 (7th Cir. 1995). For a considerable period, the Seventh Circuit had recognized a similar rule with respect to claims not raised in petitions for discretionary review on direct appeal. *Nutall v. Greer*, 764 F.2d 462 (7th Cir. 1985). Then, the Seventh Circuit abandoned the rule of *Nutall*, and held that leave to appeal to a discretionary state supreme court was unnecessary with respect to claims raised on direct appeal. *Hogan v. McBride*, 74 F.3d 144 (7th Cir. 1996); *Gomez v. Acevedo*, 106 F.3d 192 (7th Cir. 1997), vacated on other grounds, ___ U.S. ___, 118 S.Ct. 37 (1997); *Boerckel v. O'Sullivan*, 135 F.3d 1194 (7th Cir. 1998).

In *Galvan*, the court noted that this state of the law appeared "incongruent," (997 F.Supp. at 1028), and then stated:

> Moreover, we find it hard to understand why a petitioner who fails to take a discretionary appeal to the Illinois Supreme Court on direct review—and thereby risks defaulted claims that could otherwise have been raised on post-conviction review—does not default his habeas claims, while a petitioner who fails to take a similar discretionary appeal on post-conviction review—where there is much less to lose and where the likelihood of the supreme court granting leave to appeal *seems* even more remote—is an absolute bar to habeas review.

997 F.Supp. at 1029; emphasis added. To support his argument before this Court, White has transmuted the *Galvin* court's mere supposition regarding the likelihood of post-conviction review by the Illinois Supreme Court into fact. This is unconscionable.

Moreover, it appears ironic that White would attempt to use *Galvin* to support a rule different than that in *Boerckel* when the *Galvin* court presciently recognized the very incongruity which was finally acknowledged by the Seventh Circuit in White's own case. *White v. Godinez*, 143 F.3d at 1053. And, as already discussed, the exhaustion rule should not turn on the likelihood of leave to appeal being granted by a discretionary state court.

White next asserts that the matter of the availability of counsel in state collateral proceedings and on review of such proceedings somehow should have a bearing on the issue of whether leave to appeal to a state's highest court is necessary to satisfy the exhaustion requirement. (Brief in Opposition, pages 7-8). His argument is not well taken, and, in making such an argument, he demonstrates either an ignorance, or a wilful mischaracterization, of Illinois post-conviction law.

At page 8, White indicates that "there is no *right* to the assistance of counsel in post-conviction proceedings," and

"[t]herefore, in many cases in Illinois indigent prisoners may go unrepresented on collateral appeal." The very authorities White cites in purported support of his first proposition actually defeat it. The court in *People v. Partee*, 268 Ill.App.3d 857, 645 N.E.2d 414, 422 (1st Dist. 1994), noted that there is no constitutional right to the assistance of counsel in post-conviction proceedings, properly reflecting this Court's precedent.[2] The *Partee* court immediately thereafter pointed out, however, that a statutory right to counsel exists under Illinois' Post-Conviction Hearing Act, pursuant to 725 ILCS 5/122-4. As for White's second proposition, in actuality, an indigent prisoner in Illinois will almost never go unrepresented on collateral appeal, since Illinois Supreme Court Rule 651(c) explicitly guarantees indigent post-conviction petitioners the appointment of counsel on appeal.

Petitioner acknowledges the concern that criminal defendants are not entitled to counsel, constitutionally or statutorily, in petitions seeking discretionary review to the Illinois Supreme Court. But that concern is not unique to review of the denial of post-conviction relief. It is just as present on discretionary review, following a direct appeal, as is shown by the very authority which White cites, *Hogan v. McBride*, 74 F.3d 144, 147 (7th Cir. 1996).[3] The Seventh Circuit reiterated that same concern in *Boerckel v. O'Sullivan*, 135 F.3d 1194, 1202 (7th Cir. 1998), and Petitioner's response here is the same as that of O'Sullivan. Since, in Illinois at least, the prisoner virtually always will have been represented by counsel in the appeal to the intermediate appellate court, and since, under *Castille v. Peoples*, 489 U.S. 346, 351 (1989), raising claims for the first time on discretionary review is deemed not to be a fair presentment of the claims to the state courts, there is little risk that an

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[2] *Pennsylvania v. Finley*, 481 U.S. 551 (1987).

[3] White errs in his seeming characterization of that case as one involving "collateral review." Brief in Opposition, at 7.

unrepresented petitioner will be unable to present his claims to the state's highest court.

In his Point B, White lamely argues that his position is consistent with this Court's precedents, and that, since his case-specific claims of ineffective assistance of counsel are unlikely to meet the criteria which the Illinois Supreme Court uses in determining whether to exercise its discretion to grant leave to appeal, he should be forgiven for his failure to have raised them before that court. Such position is hardly persuasive.

Like the rest of his argument, White's claim here is not unique to cases on review from collateral attacks, as opposed to cases on direct appeal. If White is willing to concede that a grant of *certiorari* from the decision in *Boerckel v. O'Sullivan*, 135 F.3d 1194, 1202 (7th Cir. 1998), was "justified," (Brief in Opposition, at 3), there is no reason to deny a writ of *certiorari* here. Illinois Supreme Court Rule 315(a), on which White purports to rely, does not distinguish between direct appeals and appeals from collateral attacks of criminal convictions. Indeed, it does not even distinguish between criminal and civil cases. Further, the Rule, on its face, indicates that its list of criteria for the grant of leave to appeal, which White quotes somewhat selectively, is "neither controlling nor fully measuring the court's discretion." *See*, Illinois Supreme Court Rule 315(a).

White notes, and apparently seeks to defend, that "[t]he Seventh Circuit concluded that, *under Illinois law* a habeas petitioner need not raise every federal claim in a petition for leave to appeal to the Illinois Supreme Court on collateral review." (Brief in Opposition, at 9). Petitioner maintains that, beyond the questions of what remedies a state makes available to a prisoner for review of his federal constitutional claims, and whether such remedies might be redundant or futile, state law should have little bearing on the federal question of whether a *habeas* petitioner has exhausted his state court remedies. The state courts admittedly play an important role in being the first to address

whether federal constitutional error may have occurred in the state court proceedings. But such courts have little, if any, concern in defining what might constitute exhaustion, for federal *habeas corpus* purposes. Such should be a uniquely federal question, and Petitioner maintains that adequate exhaustion does not occur where, as here, a *habeas* petitioner is allowed to bypass a state's highest court with his claims of constitutional error. If a discretionary state supreme court appeal is deemed not to be "any available procedure" under 28 U.S.C. § 2254(c), a plausible argument could be made that this Court should liberally construe the statutory language granting its jurisdiction over decisions of "the highest state court in which a decision could be had." 28 U.S.C. § 1257(a). But this Court does not view its jurisdiction so liberally (*Costarelli v. Massachusetts*, 421 U.S. 193 (1975) (*per curiam*)), and its rationale in this respect is precisely the rationale behind the exhaustion doctrine—not to interfere with state proceedings which might otherwise resolve the matter. 421 U.S. at 196.

Candor compels discussion of *Harris v. Reed*, 489 U.S. 255 (1989), a case involving a claim which arose on post-conviction review from an Illinois conviction. Given the Court's factual recitation that Harris "did not seek review in the Supreme Court of Illinois[,]" 489 U.S. at 258, and given the Court's ultimate finding that Harris' claim survived procedural default, 489 U.S. at 266, one might attempt to view *Harris* as providing that a discretionary appeal to the state's highest court is unnecessary for exhaustion purposes when the claim raised in federal *habeas* first arose on post-conviction review.[4] *Harris* should not be so read.

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[4] This appears to be how the Seventh Circuit Court of Appeals views *Harris*. In *Hogan v. McBride*, 74 F.3d 144, 147 (7th Cir. 1996), that court found *Harris* to supersede its earlier holding in *Nutall v. Greer*, 764 F.2d 462 (7th Cir. 1985).

In *Harris*, this Court addressed whether an ambiguous statement by the Illinois Appellate Court on post-conviction review constituted an independent and adequate state ground sufficient to bar consideration of the merits of the claim in a federal *habeas* proceeding. In its factual recitation, this Court noted that Harris "did not seek review in the Supreme Court of Illinois." 489 U.S. at 258. Then, this Court adopted the "plain statement" rule of *Michigan v. Long*, 463 U.S. 1032 (1983), and *Caldwell v. Mississippi*, 472 U.S. 320 (1985), as the test for determining in a federal *habeas corpus* proceeding whether the state court's holding rested on an independent and adequate state ground. Finding no such plain statement in the Illinois Appellate Court's decision, the Court remanded the case for further proceedings, presumably a review of the merits. 489 U.S. at 266.

There is no indication in *Harris* that the government raised the claim that Harris' failure to have sought discretionary review constituted a failure to exhaust. And review of the Brief for Respondents in that case has confirmed that the Respondents did not promote such a claim. (Brief For Respondents, *Harris v. Reed*, No. 87-5677, October Term, 1987). Thus, *Harris* should provide no impediment to the relief which Petitioner seeks in the case at bar.

Finally, Petitioner must contest White's claim to the effect that Petitioner seeks a requirement that "all prisoners in the nation must *twice* appear before their state supreme courts with all issues to qualify to file a habeas corpus petition in federal court." (Brief in Opposition, at 10-11; emphasis in original). Nowhere has Petitioner taken that position. Petitioner does maintain that any issue raised before a court in federal *habeas corpus* must first have been raised to the state's highest court, regardless of whether, in state court, the issue was raised first on direct appeal or on collateral attack.

Petitioner is well aware of this Court's precedents that redundant state court proceedings will not be required in order to exhaust state court remedies. *Brown v. Allen*, 344

U.S. 443, 447, 448-49 n.3 (1953), *Wilwording v. Swenson*, 404 U.S. 249, 250 (1971). Petitioner does not assert that a petitioner must make redundant claims on post-conviction review which were made on direct appeal. Indeed, Illinois law would preclude such an argument. *See*, *People v. Neal*, 142 Ill.2d 140, 146 (1990), *cert. denied*, *Neal v. Illinois*, 502 U.S. 943 (1991). Petitioner merely maintains that, on whatever level a *habeas* petitioner first raises his constitutional claims—direct appeal or review of the denial of collateral post-conviction relief—he should be required to continue to promote such claims to the state's highest court, regardless of whether the jurisdiction of that court may be discretionary.

Try as he might, White has not shown any appreciable difference between a direct appeal and an appeal from the denial of post-conviction collateral relief which would warrant disparate treatment of petitions for leave to appeal from those two types of appeals. The relevant considerations, for purposes of determining whether exhaustion has occurred, are uniquely federal. Further, whatever differences might exist in the remedies which the various states make available should not preclude this Court from finding that the states' highest courts should be entitled to consider, before the federal courts, whether federal constitutional rights have been abridged in state court criminal proceedings. As in *Boerckel*, this Court should grant *certiorari*, and consider the important issues presented here.

CONCLUSION

For the foregoing reasons, as well as those enunciated in the petition for writ of *certiorari*, Petitioner, Salvador A. Godinez, respectfully requests that this Honorable Court grant *certiorari*, and consolidate this cause with that in *O'Sullivan v. Boerckel*, No. 97-2048.

Respectfully submitted,

JAMES E. RYAN
Attorney General of Illinois

WILLIAM L. BROWERS*
Assistant Attorney General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-2569

*Counsel of Record

Counsel for Petitioner